

Chapter 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT AND CONSERVATION

1. Land and Air Pollution and Related Issues

a. Climate change

(1) Overview

During 2009, as discussed in greater detail in this section, the United States played a lead role in efforts to address the threat of global climate change. In his address to the General Assembly on September 23, 2009, for example, President Barack H. Obama announced that “the days when America dragged its feet on this issue are over” and called for collective action to address the threat of climate change. The full text of President Obama’s speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9. *See also* President Obama’s September 22 address to the UN Climate Change Summit, available at Daily Comp. Pres. Docs., 2009 DCPD No. 00736, pp. 1–3.

(2) Meetings of major economies

On March 28, 2009, President Obama announced the inception of the Major Economies Forum on Energy and Climate (“MEF”). As a White House press release issued March 28 explained:

The Major Economies Forum will facilitate a candid dialogue among key developed and developing countries, help generate the political leadership necessary to achieve a successful outcome at the UN climate change negotiations that will convene this December in Copenhagen, and advance the exploration of concrete initiatives and joint ventures that increase the supply of clean energy while cutting greenhouse gas emissions.

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The 17 major economies are: Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia,

South Africa, the United Kingdom, and the United States. Denmark, in its capacity as the President of the December 2009 Conference of the Parties to the UN Framework Convention on Climate Change, and the United Nations have also been invited to participate in this dialogue.

See www.whitehouse.gov/the_press_office/president-obama-announces-launch-of-the-major-economies-forum-on-energy-and-climate. On July 9, 2009, the leaders of the MEF met in L'Aquila, Italy, and issued a declaration setting out the steps they would take to address climate change. The declaration, excerpted below, is available at www.whitehouse.gov/the_press_office/Declaration-of-the-Leaders-the-Major-Economies-Forum-on-Energy-and-Climate.

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We reaffirm the objective, provisions and principles of the UN Framework Convention on Climate Change. Recalling the Major Economies Declaration adopted in Toyako, Japan, in July 2008, and taking full account of decisions taken in Bali, Indonesia, in December 2007, we resolve to spare no effort to reach agreement in Copenhagen, with each other and with the other Parties, to further implementation of the Convention.

Our vision for future cooperation on climate change, consistent with equity and our common but differentiated responsibilities and respective capabilities, includes the following:

1. Consistent with the Convention's objective and science:

Our countries will undertake transparent nationally appropriate mitigation actions, subject to applicable measurement, reporting, and verification, and prepare low-carbon growth plans. Developed countries among us will take the lead by promptly undertaking robust aggregate and individual reductions in the midterm consistent with our respective ambitious long-term objectives and will work together before Copenhagen to achieve a strong result in this regard. Developing countries among us will promptly undertake actions whose projected effects on emissions represent a meaningful deviation from business as usual in the midterm, in the context of sustainable development, supported by financing, technology, and capacity-building. The peaking of global and national emissions should take place as soon as possible, recognizing that the timeframe for peaking will be longer in developing countries, bearing in mind that social and economic development and poverty eradication are the first and overriding priorities in developing countries and that low-carbon development is indispensable to sustainable development. We recognize the scientific view that the increase in global average temperature above pre-industrial levels ought not to exceed 2 degrees C. . . .

We will take steps nationally and internationally, including under the Convention, to reduce emissions from deforestation and forest degradation and to enhance removals of greenhouse gas emissions by forests, including providing enhanced support to developing countries for such purposes.

2. Adaptation to the adverse effects of climate change is essential. Such effects are already taking place. . . . There is a particular and immediate need to assist the poorest and most vulnerable to adapt to such effects. . . . Further support will need to be mobilized, should be based on need,

and will include resources additional to existing financial assistance. We will work together to develop, disseminate, and transfer, as appropriate, technologies that advance adaptation efforts.

3. We are establishing a Global Partnership to drive transformational low-carbon, climate-friendly technologies. We will dramatically increase and coordinate public sector investments in research, development, and demonstration of these technologies, with a view to doubling such investments by 2015, while recognizing the importance of private investment, public-private partnerships and international cooperation, including regional innovation centers. . . .

4. Financial resources for mitigation and adaptation will need to be scaled up urgently and substantially and should involve mobilizing resources to support developing countries. . . . The governance of mechanisms disbursing funds should be transparent, fair, effective, efficient, and reflect balanced representation. Accountability in the use of resources should be ensured. An arrangement to match diverse funding needs and resources should be created, and utilize where appropriate, public and private expertise. . . .

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(3) UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Fifteenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change (“UNFCCC”) in Copenhagen, Denmark, December 7–19, 2009. President Obama, Secretary of State Hillary Rodham Clinton, and five other cabinet members participated in the U.S. delegation, signaling the importance the United States attached to achieving a successful outcome. During the conference, President Obama and Secretary Clinton emphasized the need for an outcome containing three elements: (1) commitments by the major economies to take decisive national actions to reduce their emissions; (2) a transparency mechanism to enable states to review whether other states fulfill their commitments; and (3) financing and support to help developing countries reduce emissions and adapt to climate change. Secretary Clinton’s December 17 remarks to the press are available at www.state.gov/secretary/rm/2009a/12/133734.htm; President Obama’s December 18 address to the conference’s morning plenary session is available at Daily Comp. Pres. Docs., 2009 DCPD No. 01002, pp. 1–3. See also the U.S. website for the conference, available at www.cop15.state.gov.

On December 18, 2009, President Obama announced that the major economies had achieved a breakthrough in the negotiations, producing a document called the Copenhagen Accord. Among other things, as discussed in the excerpts below from President Obama’s December 18 press briefing, the Copenhagen Accord establishes that states need to reduce their emissions in order to achieve the goal of limiting the increase in the global temperature to two degrees Centigrade. Although not legally binding, the Copenhagen Accord provides for the implementation of targets and actions to reduce countries’ emissions by 2020 and the submission of information about those steps to the UNFCCC Secretariat by 2010. It also addresses

transparency and contains provisions concerning financing and technology to help developing countries reduce their emissions. The full text of President Obama's press briefing is available at Daily Comp. Pres. Docs., 2009 DCPD No. 01005, pp. 1-7.

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Today we've made . . . a meaningful and unprecedented breakthrough here in Copenhagen. For the first time in history all major economies have come together to accept their responsibility to take action to confront the threat of climate change.

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. . . [T]hree components, transparency, mitigation, and finance, form the basis of the common approach that the United States and our partners embraced here in Copenhagen. Throughout the day, we worked with many countries to establish a new consensus around these three points, a consensus that will serve as a foundation for global action to confront the threat of climate change for years to come.

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Earlier this evening I had a meeting with the . . . four leaders . . . from China, India, Brazil, and South Africa, and that's where we agreed to list our national actions and commitments, to provide information on the implementation of these actions through national communications, with international consultations and analysis under clearly defined guidelines. We agreed to set a mitigation target to limit warming to no more than 2 degrees Celsius and, importantly, to take action to meet this objective consistent with science. . . .

Now, this progress did not come easily, and we know that this progress alone is not enough. Going forward, we're going to have to build on the momentum that we've established here in Copenhagen to ensure that international action to significantly reduce emissions is sustained and sufficient over time. We've come a long way, but we have much further to go.

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Q . . . Can you give a little bit more detail about . . . the transparency issue . . . ? And can you speak also more specifically about cutting emissions? . . .

The President. Well, on the second question first, the way this agreement is structured, each nation will be putting concrete commitments into an appendix to the document, and so will lay out very specifically what each country's intentions are.

Those commitments will then be subject to a international consultation and analysis, similar to, for example, what takes place when the WTO is examining progress or lack of progress that countries are making on various commitments. It will not be legally binding, but what it will do is allow for each country to show to the world what they're doing, and there will be a sense on the part of each country that we're in this together, and we'll know who is meeting and who's not meeting the mutual obligations that have been set forth.

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From the perspective of the United States, I've set forth goals that are reflected in legislation that came out of the House, that are being discussed on a bipartisan basis in the Senate. And

although we will not be legally bound by anything that took place here today, we will, I think, have reaffirmed our commitment to meet those targets. . . .

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Q . . . Can you talk about what you gave up and where you might have shifted the U.S. position to get to this point? And also, if this was so hard to get to, just what you have today, how do you feel confident about getting to a legally binding agreement in a year?

The President. I think it is going to be very hard and it's going to take some time. . . .

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Essentially you have a situation where the Kyoto Protocol and some of the subsequent accords called on the developed countries who were signatories to engage in some significant mitigation actions and also to help developing countries. And there were very few, if any, obligations on the part of the developing countries.

. . . But what's happened, obviously, since 1992 is that you've got emerging countries like China and India and Brazil that have seen enormous economic growth and industrialization. So we know that moving forward it's going to be necessary if we're going to meet those targets for some changes to take place among those countries. . . . Those countries are going to have to make some changes as well, not of the same pace, not in the same way, but they're going to have to do something to assure that whatever carbon we're taking out of the environment is not just simply dumped in by other parties.

On the other hand, from the perspective of the developing countries like China and India, they're saying to themselves, per capita our carbon footprint remains very small, and we have hundreds of millions of people who don't even have electricity yet, so for us to get bound by a set of legal obligations could potentially curtail our ability to develop, and that's not fair.

So I think that you have a fundamental deadlock in perspectives that were brought to the discussions during the course of this week. And both sides have legitimate points.

My view was that if we could begin to acknowledge that the emerging countries are going to have some responsibilities, but that those responsibilities are not exactly the same as the developed countries, and if we could set up a financing mechanism to help those countries that are most vulnerable, like Bangladesh, then we would be at least starting to reorient ourselves in a way that allows us to be effective in the future.

But it is still going to require more work and more confidence building and greater trust between emerging countries, the least developed countries, and the developed countries before I think you are going to see another legally binding treaty signed.

I actually think that it's necessary for us, ultimately, to get to such a treaty, and I am supportive of such efforts. But this is a classic example of a situation where if we just waited for that, then we would not make any progress. And in fact, I think there might be such frustration and cynicism that rather than taking one step forward, we ended up taking two steps back.

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The Conference of Parties to the UNFCCC adopted a decision taking note of and attaching the Copenhagen Accord. The chapeau to the Copenhagen Accord also listed the countries that had agreed to it. Parties wishing to associate themselves with the Accord had the opportunity to add

themselves to its chapeau by informing the UNFCCC Secretariat accordingly. See COP Decision 2/CP.15, available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4>.*

b. Ozone depletion

On November 4, 2009, Daniel A. Reifsnyder, Deputy Assistant Secretary for the Environment and Sustainable Development, Department of State, made a statement at the 21st Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer (“Montreal Protocol”), held November 4–8, 2009, in Sharm el Sheikh, Egypt. In his statement, excerpted below, Mr. Reifsnyder described the joint proposal of the United States, Canada, and Mexico to take action under the Montreal Protocol to phase down the use of hydrofluorocarbons (“HFCs”). The three countries proposed to amend the Montreal Protocol by adding a new Annex F, which would address efforts to phase down the consumption and production of HFCs. The full text of Mr. Reifsnyder’s statement is available at www.state.gov/g/oes/rls/remarks/2009/131348.htm. The full text of the U.S.–Canadian–Mexican proposal, UNEP document UNEP/OzL.Pro.21/3/Add.1, is available at http://ozone.unep.org/Meeting_Documents/mop/21mop/MOP-21-3-Add-1E.pdf.

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The United States of America is pleased to join our neighbors to the North and South—the Governments of Canada and Mexico—in support of the North American proposal to phase down the use of HFCs. This is an historic proposal—never in my experience have the three governments of our North American continent joined together to propose global action to address a common threat to our environment. It is also historic in that we are seeking to address a threat that has not yet fully materialized. Global use of HFCs today is still relatively small. Our concern is that, unless we begin to act, use will increase significantly in the coming years—and it is this increased use that will pose a problem for the environment.

We believe that our proposal will provide significant climate protection benefits, partly by preventing projected increases in the use of HFCs in many countries that result from both a transition away from ozone depleting substances (ODS), but also significantly as a result of the projected growth in air conditioning and refrigeration globally. . . .

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* Editor’s note: The United States submitted its emissions targets to the UNFCCC Secretariat on January 28, 2010. *Digest 2010* will discuss relevant aspects of the U.S. submission.

. . . [S]ome have asked why we are proposing to take action under an ozone treaty on a climate issue. The answer is very simple. The climate issue is very broad and very complex. In our view, not all of the solutions to the climate problem will arise in the climate arena. We must take advantage of the tools at our disposal—wherever they may be found—to address the climate problem. This notion is found already within the Kyoto Protocol, I might note, in entrusting the International Civil Aviation Organization and the World Maritime Organization with responsibility for addressing greenhouse gas emissions from aircraft and shipping.

The Montreal Protocol does not set out explicit provisions related to the scope of the agreement, so we look to the language of the Vienna Convention to determine whether the Montreal Protocol can be used to phase down HFCs, in particular Article 2, paragraph 2(b).

This paragraph sets out general obligations for Parties to “co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities that have or are likely to have adverse effects resulting from modification of the ozone layer.”

HFCs are used primarily because they are alternatives to covered ozone depleting substances being phased out under the Protocol, and used in the very same sectors of CFC and HCFC use: foam blowing, air conditioning and refrigeration applications in particular.

In addressing HFCs, we are “harmonizing” our policies with regard to the phase-out of CFCs and HCFCs by agreeing to move away from them in a specific fashion.

We believe this concept was also reflected in Decision XIX/6, which gives priority to alternatives to HCFCs that minimize their impacts on the environment, including specifically their climate impacts.

It is therefore clear that we, as Parties, can choose to address HFCs in the Montreal Protocol consistent with Article 2, paragraph 2(b), to “co-operate in harmonizing appropriate policies” as is clearly set out in that text.

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. . . [S]ome have asked whether we mean to remove HFCs from the purview of the U.N. Framework Convention on Climate Change (Framework Convention) and the Kyoto Protocol—nothing could be more contrary to our intention. It is vital that we here and our colleagues in the climate arena work in tandem. We are proposing to change nothing under the Framework Convention and the Kyoto Protocol—only to complement them. We are proposing here to address the consumption and production of HFCs—not emissions. In our view, countries will continue to report on their emissions of HFCs under the Framework Convention and the Kyoto Protocol. Similarly, any accounting for reduced emissions of HFCs would accrue under the Framework Convention. Ultimately, to spell out this relationship more precisely we see the need for a decision under the Framework Convention, but we need not await such a decision to act now—at this meeting.

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The participants in the meeting did not reach consensus on the U.S.–Canadian–Mexican proposal. Instead, the United States, Canada, and Mexico joined 36 other states in issuing a declaration concerning alternatives to ozone depleting substances (“ODSs”) that have high global warming potentials (“GWPs”). The report of the meeting noted the declaration and

included it as an annex. See UNEP/OzL.Pro.21/8, available at http://ozone.unep.org/Meeting_Documents/mop/21mop/MOP-21-8E.pdf.

c. Mercury

On February 16, 2009, Daniel A. Reifsnyder, Deputy Assistant Secretary for the Environment and Sustainable Development, Department of State, made a statement to the Committee of the Whole at the twenty-fifth meeting of the Governing Council of the United Nations Environment Programme ("UNEP"), lending U.S. support for the development of a global legally binding instrument on mercury. Mr. Reifsnyder's statement, excerpted below, is available at www.state.gov/g/oes/rls/remarks/2009/117504.htm. On February 20, 2009, the United States joined consensus on the UNEP Governing Council in adopting Decision 25/5, which, among other things, requested UNEP's Executive Director to convene an intergovernmental committee to negotiate a global legal binding instrument on mercury.

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We are prepared, Mr. Chairman, to help lead in developing a global legally binding instrument for mercury. We believe that:

- Now is the time for governments to launch an Intergovernmental Negotiating Committee (INC);
- The first negotiating session should begin this year with the goal of completing negotiations prior to the 2012 Governing Council (GC)/Global Ministerial Environment Forum (GMEF);
- The mandate of the INC should be devoted exclusively to mercury;
- It should be comprehensive, addressing all significant sources of mercury emissions, with particular attention to sectors that have the greatest global impact such as coal-fired power plants and other sources of unintentional air emissions;
- Financial resources for implementation should focus on priority issues of greatest global concern;
- It should include approaches tailored to specific emissions sectors, and contain a level of flexibility to achieve our global goals while allowing countries discretion in terms of their path to implementation.
- Governments should support the UNEP Mercury Program and Global Mercury Partnership to continue their work concurrent with the negotiations.

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It is clear that mercury is *the* most important global chemical issue facing us today that calls for immediate action. Mercury is a chemical of global concern specifically due to its long range environmental transport, its persistence in the environment once introduced, its ability to bioaccumulate in ecosystems, and its significant negative effects on human health and the environment. The United States does not support adding additional substances to an agreement on

mercury, or diverting valuable time and attention to other issues by debating criteria and parameters for an adding mechanism. We urge delegates to focus on those issues where we can find agreement.

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2. Protection of Marine Environment and Marine Conservation

a. Air pollution from ships

On January 8, 2009, Annex VI to the International Convention for the Prevention of Pollution by Ships, 1973, as modified by subsequent Protocols ("MARPOL Convention"), entered into force for the United States. S. Treaty Doc. No. 108-7 (2003). See *Digest 2008* at 691-95 for background on Annex VI, "Regulations for the Prevention of Air Pollution from Ships."

b. Fish and marine mammals

(1) Illegal, unreported, and unregulated fishing

(i) Overview

On March 19, 2009, in testimony before the House of Representatives Committee on Natural Resources, Subcommittee on Insular Affairs, Oceans and Wildlife, William Gibbons-Fly, Director, Office of Marine Conservation, Bureau of Oceans, Environment and Science, Department of State, discussed U.S. efforts to strengthen efforts to combat illegal, unreported, and unregulated ("IUU") fishing. Among other things, Mr. Gibbons-Fly noted U.S. efforts within Regional Fisheries Management Organizations ("RMFOs") to develop boarding and inspection regimes. Mr. Gibbons-Fly cited in particular the Western Central Pacific Fisheries Commission's ("WCPFC") boarding and inspection regime, which became operational in 2008. Calling the new regime "groundbreaking," Mr. Gibbons-Fly stated:

. . . This regime is the first, and to date the only, such arrangement adopted to implement the boarding and inspection provisions of the UN Fish Stocks Agreement through a regional fisheries management organization. In negotiating these procedures under the WCPFC, we successfully established unprecedented authority for the U.S. Coast Guard to board and inspect fishing vessels on the high seas flying the flag of WCPFC members (and cooperating non-members) throughout millions of square miles of the Pacific Ocean, without the need to request and receive prior approval and authorization

from the flag State. In effect, adherence to the procedures themselves constitutes advance authorization from the flag State, in a manner fully consistent with the sovereignty exercised by flag States over their vessels operating on the high seas.

Since the arrangement became operational early in 2008, [the] Coast Guard has conducted a number of inspections throughout the Convention Area on vessels of various flags. I am pleased to note that the reports received from the flag State authorities of the vessels in question have been uniformly positive; reaffirming that, in each case, these inspections have been conducted in an efficient and respectful manner, in full accordance with the established procedures and relevant provisions of international law.

The full text of Mr. Gibbons-Fly's written testimony is available at http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_gibbons-fly.pdf. The boarding and inspection procedures, which the WCPFC adopted in December 2006 pursuant to Article 26 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, are available at www.wcpfc.int/doc/cmm-2006-08/western-and-central-pacific-fisheries-commission-boarding-and-inspection-procedures. See also the related testimony of Rear Admiral Sally Brice-O'Hara, Deputy Commandant for Operations, U.S. Coast Guard, available at http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_brice-ohara.pdf.

(ii) Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

On November 22, 2009, with strong U.S. support, the Food and Agriculture Organization ("FAO") Conference approved the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The United States signed the agreement on the same day and as of the end of 2009 was working actively to become a party to it. The agreement reflects the U.S. commitment to establish legally binding international instruments to combat IUU fishing. According to a State Department press statement issued on August 28, 2009:

The agreement represents a step forward in the fight against illegal, unreported and unregulated fishing. It is the hope of the United States that the treaty will receive

widespread adherence and full implementation. The guiding premise of the treaty is to make illegal, unreported and unregulated fishing more costly and more risky for those who continue to undermine fisheries rules.

See www.state.gov/r/pa/prs/ps/2009/aug/128418.htm.

The agreement sets minimum standards that parties must follow to deny port access to ships carrying fish caught in an illegal, unreported, or unregulated way and to prevent vessels known to be involved in IUU fishing from accessing port services. The agreement adopts the definition of IUU fishing used in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported or Unregulated Fishing, but notes also in Article III, paragraph 3 that fishing activity is IUU if it is illegal, or unreported, or unregulated, such that only one of these criteria need be met. Article III(3) thereby addresses criticism that the definition of IUU fishing in the FAO International Plan of Action does not make clear whether barred fishing could be any one of the three categories or must be all three. For additional details on the agreement, see <ftp://ftp.fao.org/docrep/fao/meeting/018/k6339e.pdf>. The FAO International Plan of Action is available at www.fao.org/fishery/ipoa-iuu/legal-text/en.

(iii) Report to Congress on Implementation of Title VI of the Magnuson-Stevens Fishery and Conservation Reauthorization Act of 2006

In January 2009 the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (“NMFS”) submitted its first biennial report to Congress pursuant to § 406 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007 (“MSRA”), Pub. L. No. 109-479, 120 Stat. 3575, 3633. For background on the MSRA, see *Digest 2007* at 706-9. The report, as the MSRA requires, identified France, Italy, Libya, Panama, the People’s Republic of China, and Tunisia as states having vessels engaged in IUU fishing or bycatch of protected living marine resources (“PLMRs”).

In testimony before the Subcommittee on Insular Affairs, Oceans and Wildlife of the U.S. House of Representatives Committee on Natural Resources on March 19, 2009, Dr. Rebecca Lent, Director, Office of International Affairs, NMFS, discussed the steps the United States had taken to encourage the countries identified in the report to address the IUU fishing described in the report. As Dr. Lent explained in her written statement:

Working through the Department of State, NOAA has contacted relevant officials in each of the identified nations to initiate formal consultations. The U.S. government is committed to working cooperatively to address IUU fishing with these nations, including bilaterally and through relevant multilateral fora. Progress made bilaterally and multilaterally in addressing the IUU activity will inform the last step of our domestic process, which is to certify to Congress whether appropriate corrective action has been taken by the identified nations, or whether the relevant international fishery management organization has implemented measures that are effective in ending IUU fishing activity. The failure of an identified nation to take sufficient corrective action, as determined by the Secretary of Commerce, may lead to denial of port privileges for fishing vessels of that nation, prohibitions on the importation of certain fisheries products from that nation into the United States, and other measures.

In response to the outreach conducted by the U.S. government, several identified nations have provided information indicating that positive steps have been taken to address the IUU fishing activity described in the biennial report to Congress. NOAA is hopeful that outreach and cooperative engagement with these nations will lead to further progress.

The full text of Dr. Lent's written testimony is available at http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_lent.pdf. Excerpts follow from the report, summarizing its contents and discussing the statutory requirement for its list of states. The full text of the report is available at www.nmfs.noaa.gov/msa2007/docs/msra_biennial_report_011309.pdf.

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... Title IV of the MSRA amends the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) to require the Secretary of Commerce to produce a biennial report to Congress that includes: the state of knowledge on the status of international living marine resources shared by the United States or subject to treaties or agreements to which the United States is a party; a list of nations the United States has identified as having vessels engaged in IUU fishing and/or bycatch of PLMRs; a description of efforts taken by nations on those lists to take appropriate corrective action consistent with the Act; progress at the international level to strengthen the efforts of international fishery management organizations to end IUU fishing; and the steps taken by the Secretary at the international level to adopt measures comparable to those of the United States to reduce the impacts of fishing and other practices on PLMRs.

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[IX.A.] IUU. As amended by the MSRA, Section 607 of the Moratorium Protection Act requires the Secretary of Commerce to submit a report to Congress, by not later than two years after the date of enactment of the MSRA and every two years thereafter, a report that, *inter alia*, lists nations whose vessels have been identified as having fishing vessels engaged in IUU fishing pursuant to Section 609(a) of the Moratorium Protection Act. Section 609(a), in turn, provides that the Secretary shall identify a nation with regard to IUU fishing if:

“fishing vessels of that nation are engaged or have been engaged at any point during the preceding two years in IUU fishing—

(1) the relevant international fishery management organization has failed to implement effective measures to end the illegal, unreported, or unregulated fishing activity by vessels of that nation or the nation is not a party to, or does not maintain cooperating status with, such organization; or

(2) where no international fishery management organization exists with a mandate to regulate the fishing activity in question.”

The Act also defines IUU fishing, a definition that has been adopted by NMFS for purposes of implementation (72 Fed. Reg. 18404, April 12, 2007):

“(A) fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

(B) overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; and

(C) fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals located beyond national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.”

As Section 609(a) refers to activities of “vessels,” for purposes of identification for IUU fishing activities, a nation must have more than one vessel engaged in IUU fishing activities during the relevant time period for consideration, which is the “preceding two years” from submission of the biennial report to Congress. Information concerning activities outside that time period cannot form the basis for an identification decision. In this first identification report, NMFS is relying upon information related to vessels engaged in IUU fishing activities as the basis for identification of a nation. NMFS has concerns about other non-compliant activities, such as non-compliance with RFMO reporting and other requirements. However, it is not clear whether these actions (or failures to take required actions) appropriately can be the bases of identification because they may not reflect actions by specific vessels, as contemplated by the existing statutory language as a potential requirement for identification. We are, however, also including information about other non-compliant activities within this Report to demonstrate NMFS’s concerns about the extent of such

violations. Current statutory provisions do not appear to allow for identification in the absence of some linkage to the activity of vessels.

It is also worth noting that any entity other than a “nation” cannot be identified for having vessels engaged in IUU fishing activity for purposes of the Moratorium Protection Act. Thus, fishing entities and other governance arrangements and institutions cannot be identified under this statute. Moreover, as noted above, IUU fishing is limited to fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is party; overfishing of stocks shared by the United States (which precludes stocks found solely within the EEZ of another nation) to which no international conservation or management measures apply, where the overfishing has adverse impacts on the stocks; or fishing activity with adverse impact on seamounts, hydrothermal vents, or cold water corals, to which no conservation and management measures apply. Activities that fall outside this definition, likewise, cannot form the basis of an identification decision.

PLMR Bycatch. As amended by the MSRA, Section 607 of the Moratorium Protection Act also requires that the biennial report to Congress list those nations whose vessels have been identified pursuant to Section 610(a) of the Moratorium Protection Act as having vessels engaged in fishing activities or practices that result in bycatch of PLMRs. Section 610(a) requires that the Secretary identify a nation for bycatch activities if:

“(1) fishing vessels of that nation are engaged, or have been engaged during the preceding calendar year in fishing activities or practices;

(A) in waters beyond any national jurisdiction that result in bycatch of a protected living marine resource, or

(B) beyond the exclusive economic zone of the United States that result in bycatch of a protected living marine resource shared by the United States;

(2) the relevant international organization for the conservation and protection of such resources or the relevant or regional fishery organization has failed to implement effective measures to end or reduce such bycatch, or the nation is not a party to, or does not maintain cooperating status with, such organization; and

(3) the nation has not adopted a regulatory program governing such fishing practices designed to end or reduce such bycatch that is comparable to that of the United States, taking into account different conditions.”

“Protected living marine resource” is defined by Section 610 (e) of the Moratorium Protection Act as:

“(1) non-target fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but

(2) does not include species, except sharks, managed under the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, or any international fishery management agreement.”

Thus, identification of nations for bycatch activities can be based only on current activities of fishing vessels of that nation, or activities in which those vessels have been engaged during the preceding calendar year from submission of the biennial report to Congress. Activities outside that timeframe cannot form the basis for identification. Likewise, the statute restricts action to activities that result in the bycatch of PLMRs, as defined under the Moratorium Protection Act, where the relevant international conservation organization has failed to implement effective measures to end or reduce such bycatch or the nation is not a party to or a cooperating partner with such organization; and the nation has not adopted a regulatory program governing such fishing practices that is comparable to that of the United States, taking into account different conditions. Bycatch activities that fail to meet these standards cannot form the basis for identification.

* * * *

(2) Commission for the Conservation of Antarctic Marine Living Resources

(i) U.S. adoption of CCAMLR conservation measures

On February 12, 2009, the Department of State's Office of Ocean Affairs and the Department of Commerce, National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") published the conservation and management measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR") at its twenty-seventh meeting in 2008. 74 Fed. Reg. 7110 (Feb. 12, 2009); see also *Digest 2008* at 712–13. The Federal Register notice explained that:

. . . All the measures were agreed upon in accordance with Article IX of the Convention for the Conservation of Antarctic Marine Living Resources (the Convention). Measures adopted restrict overall catches of certain species of finfish, squid, krill, and crabs, restrict fishing in certain areas, restrict use of certain fishing gear, specify implementation and inspection obligations supporting the Catch Documentation Scheme of Contracting Parties, promote compliance with CCAMLR measures by non-Contracting Party vessels, and require vessels engaged in bottom fishing to report data on benthic organisms recovered by their gear. . . .

The notice sought public comments on the proposed measures, noting that "[u]nder Article IX(6)(c) of the Convention, the United States has 90 days after the November 12, 2008, notification by the Commission to consider the Conservation Measures agreed to at the Twenty-Seventh Meeting of CCAMLR and respond to the Secretariat of CCAMLR that we are unable to accept a Conservation Measure(s)."

On June 17, 2009, NMFS published a Federal Register notice stating that the United States had accepted the measures and that the measures would take effect on that day. The notice also included summaries of the 22 new measures and two resolutions CCAMLR adopted in 2008. 74 Fed. Reg. 28,668 (June 17, 2009).

(ii) Protection of vulnerable marine ecosystems: Bottom fishing

The United States participated in the twenty-eighth meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), October 26–November 6, 2009, in Hobart, Australia. During the meeting, the United States expressed concern that CCAMLR's Scientific Committee had not been able to analyze the anticipated impact on vulnerable marine ecosystems ("VMEs") of two states' proposed fishing activities for the 2009/10 season. The Committee could not conduct its review, as CCAMLR Conservation Measure 22-06 requires, because the two states did not submit their preliminary impact assessments in a timely manner. The U.S. delegation noted that CCAMLR adopted the Conservation Measure in response to the 2006 UN General Assembly Resolution on Sustainable Fisheries, which called on regional fisheries management organizations ("RFMOs") to assess the potential impact of individual bottom fishing activities on VMEs and to ensure that any activities assessed as having significant adverse impacts are managed to prevent those impacts or are not authorized to proceed. U.N. Doc. A/RES/61/105. The U.S. delegation stated that CCAMLR's ability to prevent significant adverse impacts to VMEs is severely weakened when its Scientific Committee cannot evaluate the preliminary impact assessments states submit concerning their proposed fishing activities.

(3) South Pacific Regional Fisheries Management Organization treaty negotiations

On November 14, 2009, negotiations to establish a regional fisheries management organization ("RFMO") in the South Pacific Ocean concluded with the adoption of the Convention on the Conservation and Management of High Seas Resources of the South Pacific Ocean. Once the treaty enters into force, the new RFMO will manage non-highly migratory species and address the impact of fisheries on vulnerable marine ecosystems. The convention is a best-practices fisheries management treaty that draws on the agreements establishing RFMOs in the Pacific, Indian, and Atlantic oceans (the Western and Central Pacific Fisheries Convention ("WCPFC"), the Southern Indian Ocean Fisheries Agreement ("SIOFA"), and the South East Atlantic Fisheries Organization ("SEAFO")). It also contains a new feature, concerning decision-making procedures for the commission the treaty establishes. Articles 16 and 17, as well as Annex II, establish an objection

procedure that applies when states parties cannot reach consensus within the commission, with limited bases for objections and the opportunity for a panel review.

(4) North Pacific Regional Fisheries Management Organization treaty negotiations

During 2009 negotiations continued to establish an RFMO for the North Pacific. Russia, Korea, Japan, and the United States began the negotiating process in 2006, with the aim of addressing bottom fishing activities in the Emperor Sea Mounts in the Northwest Pacific. At the urging of the United States, the negotiations have expanded to develop a treaty to cover the entire North Pacific (the southern boundary of which remains to be determined) and to cover all fisheries resources not already managed by another treaty body.

d. Sea turtle conservation and shrimp imports

On May 1, 2009, the Department of State made its annual certifications related to conservation of sea turtles. The Supplementary Information section of the Federal Register notice, excerpted below, explained the Department's action and the applicable legal framework. 74 Fed. Reg. 21,048 (May 6, 2009).

* * * *

Section 609 of Public Law 101-162 prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) That the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State. Revised State Department guidelines for making the required certifications were published in the *Federal Register* on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On May 1, 2009, the Department certified 15 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Belize, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Madagascar, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Suriname, and Venezuela.

The Department also certified 24 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Eight nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather

than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The eight nations and one economy are: the Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru and Sri Lanka.

The 2009 recommendation for certification changes Costa Rica's status by de-certifying that country. For several years, OES/OMC [the State Department's Bureau of Oceans and International Environmental and Scientific Affairs Office of Marine Conservation] has been accumulating data, both through certification visits and from credible third-party sources suggesting that Costa Rica's program did not provide sanctions for TED violations that served as an effective deterrent against the failure to use TEDs. In meetings with senior Costa Rican fisheries officials during the December 2008 certification visit, the State Department representative stressed that without rapid remedial action Costa Rica's certification might be compromised. Costa Rican officials were aware of the issue and promised to resolve it early in 2009. However, the United States Embassy in San Jose reports that since that December visit Costa Rican authorities have not taken all the action they promised. Additionally, third parties, including Costa Rican Non-Governmental Organizations (NGOs), have written OES/OMC saying that TED violations in Costa Rica still go unpunished. Because of Costa Rica's ineffective enforcement mechanism for TEDs violations, the State Department has concluded that Costa Rica's regulatory program governing the incidental take of sea turtles is not currently comparable to that of the United States.

* * * *

e. Land-based sources and activities, Wider Caribbean Region

On February 13, 2009, the United States deposited its instrument of ratification of the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annexes ("LBS Protocol"), done at Oranjestad, Aruba, on October 6, 1999. S. Treaty Doc. No. 110-1 (2007). For background, see *Digest 2007* at 724-28 and *Digest 2008* at 715-16. As of the end of 2009, the LBS Protocol had not yet entered into force.

3. Other Conservation Issues

a. Transboundary oil and gas resources

(1) International Law Commission questionnaire

On May 8, 2009, the United States responded to a questionnaire on transboundary oil and gas resources that the International Law Commission's Working Group on Shared Natural Resources had developed. The U.S. response is set forth below (internal cross references and

attachments omitted) and is also available in full at www.state.gov/s/l/c8183.htm.

1. Do you have any agreement(s), arrangement(s) or practice with your neighboring State(s) regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil or gas? Such agreements or arrangement should include, as appropriate, maritime boundary delimitation agreements, as well as unitization and joint development agreements or other arrangements. Please provide a copy of the agreement(s) or arrangement(s) or describe the practice.

Aside from certain provisions in one maritime boundary treaty with Mexico (described below), the United States has not entered into any international agreements or arrangements, nor established any practice with neighboring States, in relation to transboundary oil and gas reservoirs along the U.S. maritime or continental shelf boundaries with Mexico or Canada. We also are not aware that any such transboundary reservoirs have been identified. The United States also has identified no agreements, arrangements or established practice with its neighboring States specific to the exploration and exploitation of transboundary oil and gas resources along its land boundaries.

The United States has two maritime boundary and delimitation agreements with Mexico. The first is the U.S.–Mexico Treaty on Maritime Boundaries (signed at Mexico City May 4, 1978; entered into force November 13, 1997), which establishes the maritime boundary between the United States and Mexico out to 200 miles in the Gulf of Mexico and the Pacific Ocean, using the principle of equidistance. This agreement does not address the exploration or exploitation of transboundary oil and gas resources. In addition, the agreement left two “gaps,” or areas outside the EEZ [Exclusive Economic Zone] jurisdiction of either state: one in the eastern Gulf (which concerned Mexico, Cuba, and the United States), and one in the western Gulf (which concerned the United States and Mexico).

To address the gap in the western Gulf, the United States and Mexico concluded the Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, with annexes (signed at Washington June 9, 2000; entered into force January 17, 2001) (“Western Gap Treaty”). Again, applying the principle of equidistance, the agreement allots 62% of the 17,190 km² area to Mexico and 38% to the United States. The agreement also established a “buffer zone” extending 1.4 nautical miles on either side of the boundary in the Western Gap, within which neither party may engage in drilling or exploitation of the continental shelf for a period of ten years.

While utilization and joint development arrangements were not part of this agreement, the agreement does address the subject of possible oil and gas transboundary reservoirs. In particular, the agreement requires each Party, in accordance with its national laws and regulations, to facilitate requests from the other Party to authorize geological and geophysical studies to help determine the possible presence and distribution of transboundary reservoirs. In addition, each Party is required to share geological and geophysical information in its possession in order to determine the possible existence and location of transboundary reservoirs. In the event any transboundary reservoir is identified, moreover, the agreement obligates the Parties “to seek to reach agreement for the efficient and equitable exploitation of such transboundary reservoirs.” *See* art. V(1)(b).

2. Are there any joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of the transboundary oil or gas?

We have identified no joint bodies, partnerships or formal mechanisms with Mexico or Canada to address exploration, exploitation and management of transboundary oil or gas. Along its maritime boundary, the United States itself does not engage in these forms of activity, but instead issues Outer Continental Shelf leases within U.S. jurisdiction on a competitive basis to private oil and gas companies. These leases and their operators must adhere to the U.S. laws and regulations, as well as the terms of the lease. Please see the Outer Continental Shelf Lands Act (OCSLA) and its implementing regulations, the most pertinent of which are found at 30 C.F.R. Parts 250, 256, and 260.

3. If the answer to question 1 is yes, please answer the following questions on the content of the agreements or arrangements and regarding the practice:

(a) Are there any specific principles, arrangements, or understandings regarding allocation or appropriation of oil and gas, or other forms of cooperation?

There are no principles, arrangements, or understandings regarding allocation or appropriation of oil and gas production from transboundary reservoirs, as no transboundary reservoirs have been identified along the U.S. maritime boundary. The only forms of cooperation concern data sharing and other limited forms of cooperation described in the Western Gap Treaty with regard to possible transboundary reservoirs.

(b) Are there any arrangements or understandings or is there any practice regarding prevention and control of pollution or regarding other environmental concerns, including mitigation of accidents?

Because the United States has no arrangements or practices regarding the exploration and exploitation of transboundary oil and gas resources, there are no related arrangements or understandings regarding pollution prevention and control or other environmental concerns. As a domestic matter, oil and gas operators operating in areas under U.S. jurisdiction are required to follow all U.S. laws and regulations, many of which relate to pollution and environmental issues. For example, see generally the OCSLA, and specifically its implementing regulations at 30 C.F.R. Part 250. In addition, U.S. Government inspectors visit and inspect offshore facilities regularly to ensure that all equipment and facilities comply with regulatory requirements.

4. Please provide any further comments or information, including legislation, judicial decisions, which you consider relevant or useful to the Commission in the consideration of issues regarding oil and gas.

There is no U.S. legislation or judicial decision specifically addressing transboundary reservoirs at this time and the relevant agency in the federal government currently lacks domestic legislative authority to enter into a cooperative development arrangement (such as a joint plan, allocation, or unitization arrangement) with a neighboring State. Our Outer Continental Shelf operators are subject to a number of laws and regulations, including provisions for domestic unitization arrangements between leaseholders in certain circumstances. In general, operators are allowed to explore, develop, and produce hydrocarbons from their leased acreage pursuant to the “modern rule of capture,” which requires (for example) resource conservation practices and maximizing ultimate recovery from resource reservoirs.

5. Are there any aspects in this area that may benefit from further elaboration in the context of the Committee’s work?

The United States believes that state practice in the area of transboundary oil and gas resources is divergent and relatively sparse, and that specific resource conditions likewise vary widely. In addition, development of oil and gas resources, including transboundary resources, entails very sensitive political and economic considerations. Given these factors, the United States does not believe it would be helpful or wise for the Commission to study this area further or attempt to extrapolate rules of customary international law from limited practice.

(2) International Law Commission report to the General Assembly

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. As excerpted below, Mr. Simonoff expressed the U.S. view that the ILC should not include oil and gas issues in its consideration of the issue of shared natural resources. The full text of Mr. Simonoff's statement is available at www.state.gov/s/l/c8183.htm; the ILC report is available at <http://untreaty.un.org/ilc/reports/2009/2009report.htm>.

* * * *

We note that the Commission has endorsed a process for obtaining and reviewing information to help decide whether to address transboundary oil and gas resources. As part of this process, the Commission plans to re-circulate a questionnaire asking States about their practice regarding transboundary oil and gas deposits, and seeking views about whether there are oil and gas issues that can usefully be addressed by the Commission. The United States has been constructively engaged in this discussion and submitted a response to the questionnaire when it was previously circulated.

As we stated in our response to the questionnaire and elsewhere, we ultimately do not support inclusion of oil and gas issues in the Commission's consideration of shared natural resources. State practice in the area of transboundary oil and gas resources is divergent, essentially bilateral, and relatively sparse. Also, the subject matter is highly technical, and specific resource conditions vary widely. Given the political and economic stakes in oil and gas resources, states are well aware of the issues surrounding oil and gas and therefore are not in as much need of instruction or encouragement by the Commission in dealing with such resources.

Thus, we believe that it would not be a productive exercise for the Commission to try to extrapolate customary international law, common principles, or best practices from the divergent and sparse state practice in this area.

* * * *

b. Forest conservation

On June 30, 2009, the United States and Indonesia entered into agreements to protect Indonesia's tropical forests, financed by relief from debt owed to the United States and contributions from two non-governmental organizations, Conservation International and Yayasan Keanekaragaman Hayati Indonesia ("KEHATI"). A Department of State press release describing the agreement is excerpted below and available at www.state.gov/r/pa/prs/ps/2009/06a/125500.htm.

The Governments of the United States of America and the Republic of Indonesia, together with two environmental NGOs, Conservation International and Yayasan Keanekaragaman Hayati Indonesia (KEHATI), have signed agreements for the largest debt-for-nature swap under the Tropical Forest Conservation Act (TFCA) since its passage in 1998. The agreements will reduce Indonesia's debt payments to the United States Government by nearly \$30 million over the next eight years. In return, the Government of Indonesia has committed these funds to support grants to protect and restore the country's tropical forests.

* * * *

The swap is made possible through contributions of \$20 million by the U.S. Government under the TFCA and a combined donation of \$2 million from Conservation International and KEHATI. Grants provided under the TFCA program will support activities such as conserving protected areas, improving natural resource management and supporting the development of sustainable livelihoods for communities that rely on forests.

The Indonesia agreement marks the 15th TFCA deal, following agreements with Bangladesh, Belize, Botswana, Colombia, Costa Rica, El Salvador, Guatemala, Jamaica, Panama (two agreements), Paraguay, Peru (two agreements) and the Philippines. Over time, these debt-for-nature programs together will generate more than \$218 million to protect tropical forests.

c. Antarctic Treaty

(1) Fiftieth anniversary commemoration

On April 6–17, 2009, the United States hosted the Thirty-Second Antarctic Treaty Consultative Meeting in Baltimore, Maryland, at which participants commemorated the fiftieth anniversary of the signing of the Antarctic Treaty. The Antarctic Treaty was signed in Washington on December 1, 1959, and it entered into force on June 23, 1961. 12 U.S.T. 794; T.I.A.S. 4780; 402 UNTS 71. The United States serves as depositary for the treaty.

To begin the meeting, a ministerial-level gathering at the State Department in Washington, D.C., the United States hosted the first-ever joint session of the Antarctic Treaty Consultative Meeting and the Arctic Council on April 6. Secretary of State Clinton stressed the continuing importance of the Antarctic Treaty in remarks to the joint session on April

6. Secretary Clinton's statement, excerpted below, is available at www.state.gov/secretary/rm/2009a/04/121314.htm.

* * * *

In 1959, representatives from 12 countries came together in Washington to sign the Antarctic Treaty, which is sometimes referred to as the first arms control agreement of the Cold War. Today, 47 nations have signed it. And as a result, Antarctica is one of the few places on earth where there has never been war. Other than occasional arguments among scientists and those stationed there over weighty matters having to do with sports, entertainment, and science, there has been very little conflict.

* * * *

The genius of the Antarctic Treaty lies in its relevance today. It was written to meet the challenges of an earlier time, but it and its related instruments remain a key tool in our efforts to address an urgent threat of this time, climate change, which has already destabilized communities on every continent, endangered plant and animal species, and jeopardized critical food and water sources.

Climate change is shaping the future of . . . our planet in ways we are still striving to understand. But the research made possible within the framework of the Antarctic Treaty has shown us that catastrophic consequences await if we don't take action soon. The framers of the treaty may not have foreseen exactly the shape of climate change, but their agreement allowed scientists to model its effects, including glaciologists studying the dynamics of ice, biologists exploring the effects of harsh temperatures on living organisms, geophysicists like those who discovered the hole in the ozone layer above Antarctica that prompted the ban embodied in the 1987 Montreal Protocol.

...

So the treaty is a blueprint for the kind of international cooperation that will be needed more and more to address the challenges of the 21st century, and it is an example of smart power at its best. . . .

* * * *

The United States stands in strong support of both the Antarctic Treaty and its purpose: to maintain . . . Antarctica as a place of peace and to use the science that can only be performed there to benefit the entire planet.

* * * *

In her statement, Secretary Clinton also discussed U.S. proposals for the Consultative Parties of the Antarctic Treaty to consider during their meeting. Secretary Clinton described the proposals as follows:

The United States has also submitted a proposal to the Consultative Parties of the Antarctic Treaty to extend marine pollution rules in a manner that more accurately reflects the boundaries of the Antarctic ecosystem. Strengthening environmental regulation is especially

important as tourism to . . . Antarctica increases. The United States is concerned about the safety of the tourists and the suitability of the ships that make the journey south. We have submitted a resolution that would place limits on landings from ships carrying large numbers of tourists. We have also proposed new requirements for lifeboats on tourist ships to make sure they can keep passengers alive until rescue comes. And we urge greater international cooperation to prevent discharges from these ships that will further degrade the environment around . . . Antarctica.

During their meeting, the Consultative Parties adopted Measure 15, “Landing of persons from passenger vehicles in the Antarctic treaty area,” which contained all substantive aspects of the U.S. proposal for limiting landings from ships carrying large numbers of tourists. That proposal and the other U.S. proposals are available in Part IV.2. of the final report on the meeting, available at www.ats.aq/documents/atcm_fr_images/ATCM32_fr001_e.pdf.

(2) Ministerial declaration

On April 6, 2009, the Consultative Parties to the Antarctic Treaty adopted the “Antarctic Treaty Consultative Meeting XXXII Washington Ministerial Declaration on the Fiftieth Anniversary of the Antarctic Treaty.” In the declaration, the Consultative Parties “reaffirm[ed] their continued commitment to the objectives and purposes of the Antarctic Treaty and the other elements of the Antarctic Treaty system.” Among other things, the Consultative Parties also

2. *[r]eaffirm[ed]* the importance of the Treaty’s provisions guaranteeing freedom of scientific investigation and reserving Antarctica exclusively for peaceful purposes, free from measures of a military nature;

* * * *

4. *[u]nderscore[d]* the importance of the Protocol on Environmental Protection to the Antarctic Treaty;

5. *[r]eaffirm[ed]* their commitment to Article 7 of the Environmental Protocol, which prohibits any activity relating to mineral resources, other than scientific research;

6. *[underline[d]* the importance of cooperation related to the conservation of living marine resources and strengthened implementation under the Convention on the Conservation of Antarctic Marine Living Resources; [and]

* * * *

8. . . . *[encourage[d]* other States that are committed to the objectives of the Antarctic Treaty to accede [to it] in accordance with their terms. . . .

The full text of the declaration is available at
www.state.gov/g/oes/rls/other/2009/121339.htm.

(3) Annex on Liability Arising from Environmental Emergencies

On April 2, 2009, President Obama transmitted to the Senate for its advice and consent to ratification Annex VI on Liability Arising from Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty (“Annex VI”). S. Treaty Doc. No. 111–2 (2009). Annex VI, which was adopted at Stockholm on June 14, 2005, has not yet entered into force for any state. The Protocol on Environmental Protection to the Antarctic Treaty (“Protocol”) together with its Annexes I–IV, adopted at Madrid on October 4, 1991, and Annex V to the Protocol, adopted at Bonn on October 17, 1991, entered into force for the United States on January 14, 1998, and May 24, 2002, respectively. President Obama’s letter transmitting Annex VI to the Senate stated:

In Article 16 of the Protocol, the Parties undertook to elaborate, in one or more Annexes, rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol. Annex VI sets forth rules and procedures relating to liability arising from the failure of operators in the Antarctic to respond to environmental emergencies.

I believe Annex VI to be fully in the U.S. interest. Its provisions advance the U.S. goals of protecting the environment of Antarctica, establishing incentives for Antarctic operators to act responsibly, and providing for the reimbursement of costs incurred by the United States Government when it responds to environmental emergencies caused by others.

As the Department of State report, which Secretary Clinton submitted to the President on March 13, 2009, and is included in S. Treaty Doc. No. 111-2, stated:

Pursuant to Annex VI . . . , the Parties agree to require their operators to take preventative measures and establish contingency plans for preventing and responding to environmental emergencies in the Antarctic Treaty area and to take prompt and effective response action to such emergencies arising from their activities. . . .

Annex VI is not self-executing. Annex VI will require implementing legislation, which will be submitted shortly to Congress for its consideration. . . .

See Digest 2005 at 755 for additional background.

B. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

Plant Genetic Resources

On November 8, 2009, Dr. Kerri-Ann Jones, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, testified before the Senate Committee on Foreign Relations in support of the International Treaty on Plant Genetic Resources for Food and Agriculture. President George W. Bush transmitted the treaty to the Senate on July 7, 2008, for advice and consent to ratification. See S. Treaty Doc. No. 110-19 (2008); *see also Digest 2008* at 725-27. Excerpts below from Dr. Jones's testimony describe the treaty and its significance for the United States. The full text of Dr. Jones's written statement is available at <http://foreign.senate.gov/testimony/2009/JonesTestimony091110a.pdf>.

* * * *

. . . By establishing a stable legal framework for international germplasm exchanges, this Treaty benefits both research and commercial interests in the United States. The Treaty also promotes global food security through the conservation and sustainable use of plant genetic resources for food and agriculture.

The centerpiece of the Treaty is the establishment of a "Multilateral System" for access to, and benefit-sharing regarding, certain plant genetic resources to be used for research, breeding and training for food and agriculture. The scope of the Treaty's coverage currently encompasses genetic resources of 64 crops and forages that are maintained by International Agricultural Research Centers or that are under the management and control of national governments and in the public domain. Access to covered germplasm is granted through a Standard Material Transfer Agreement,

a contract that defines the terms of access and benefit-sharing. Furthermore, the Treaty provides a mechanism for enabling developing countries to acquire the capacities needed to conserve and sustainably use plant germplasm essential for food security, including facing the global challenges associated with climate change.

The Treaty entered into force in 2004 and now has 120 Parties. The United States signed the Treaty in 2002. The President forwarded it to the Senate for consideration in July 2008, after negotiations of the Standard Material Transfer Agreement were completed. Throughout the Treaty negotiating process, the United States was firmly committed to creating a system that promotes U.S. and global food security and protects U.S. access to genetic resources held outside our borders. The United States also sought to protect the ability of the International Agricultural Research Centers—the institutions largely responsible for the “Green Revolution” which saved billions of lives—to continue to genetically improve crops that underpin global food security. The Treaty enjoys broad stakeholder support, including support for U.S. ratification from several prominent industry organizations such as the American Seed Trade Association, the National Farmers Union, the American Soybean Association, the National Association of Wheat Growers, the National Corn Growers Association, the Biotechnology Industry Organization and the Intellectual Property Owners of America.

Mr. Chairman, the Treaty is consistent with existing U.S. practice and may be implemented under existing U.S. authorities. No statutory changes are needed. The Agricultural Research Service, in its capacity as manager of the National Plant Germplasm System, would play a major role in domestic Treaty implementation. For more than 50 years, the U.S. National Plant Germplasm System has distributed samples of germplasm to plant breeders and researchers worldwide and free of charge, thereby already contributing significantly to the global effort to safeguard plant germplasm for food security, now and in the future. Consequently, the United States is already in compliance with key provisions of the Treaty, and ratification would not entail major policy or technical changes to current National Plant Germplasm System operations.

* * * *

Ratification of the Treaty would not only underscore our continued leadership but it would also help U.S. farmers and researchers sustain and improve their crops and promote food security for future generations, not only in the United States but globally. . . .

Cross References

International Convention on Civil Liability for Oil Pollution Damage and applicability in U.S. litigation, Chapter 4.C.1.

World Trade Organization, Chapter 11.C.